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Spiecker, B.; Steutel, J.W.

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# Sex Between People with “Mental Retardation”: an Ethical Evaluation

BEN SPIECKER & JAN STEUTEL

*Vrije Universiteit, Amsterdam, the Netherlands*

**ABSTRACT** *Is sex between people with “mental retardation”[1] morally permissible and, if at all, under what conditions? This paper tries to answer this question, but only with regard to sex between biologically mature individuals with mild or moderate mental retardation. First, the concepts of “sexual activity” and “mental retardation” are analysed briefly, which is challenging given the widely divergent and sometimes rather awkward definitions of these concepts. On the basis of this analysis, it is argued that the liberal principle of mutual consent, if taken as a necessary condition of permissible sex, has unacceptable consequences for people with mental retardation. Many forms of sex between them would be morally impermissible, given the fact that their limited powers of practical reasoning will often make valid consent well-nigh impossible. As an alternative to the liberal principle of permissible sex, conditions are specified that include the additional consent of caretakers. If people with mental retardation do not have the capacities of practical deliberation required for valid consent, care providers with mature reasoning powers should act as their substitutes. Finally, some important implications for the moral education of future care professionals are spelled out.*

Are people with “mental retardation” sexual beings? Do they have, just like people who are not mentally retarded, sexual desires and sexual feelings? The 9th edition of *Mental Retardation*, published by the American Association on Mental Retardation (1992), gives the impression that sexuality plays hardly any role in the life of people with mental retardation. The Index of the book, which is fairly elaborate, does not include the word “sexuality” or one of its cognates. As far as we were able to determine, the word is used three times throughout the book, only in relation to health and appropriate behaviour, and without any explanation or illustration (pp. 40, 41). This is quite different from the impression given by Dutch specialist journals for professionals serving those with mental retardation. In the last 20 years or so many articles have been written on various aspects of the sex life of people with mental retardation, the practical problems their sexual desires and behaviour give rise to, as well as the different ways in which those problems could be tackled by professionals (nurses, social workers, care providers). In nearly all these articles the right of people with mental retardation to be involved in sexual relationships is taken for granted. The questions discussed focus rather on what this right means in different contexts and how it could be implemented in various settings.

It is remarkable that the articles published in the journals indicated do not make any reference to publications in the domain of moral philosophy. Many of the problems discussed (regarding masturbation, pornographic material, visiting prostitutes, assistance of care professionals, etc.) are practical not only in an instrumental sense but definitely also in a moral or ethical sense. Nevertheless, no connection is made with related philosophical discussions, not even with important recent publications on human sexuality in the field of applied ethics (e.g. Belliotti, 1993; Soble, 1996; Archard, 1998; Primoratz, 1999). It is also striking, however, that these philosophical essays, in which many different forms of sexuality are discussed, do not offer any systematic evaluation of sex with or between people with mental retardation. To be sure, incidental reference is made to the "mentally impaired" (Belliotti, 1993, p. 195) or the "mentally disabled" (Archard, 1998, p. 44), especially in relation to the topic of consent. In one essay (Archard, 1998, pp. 60–64, 66) sexual relations between professionals and clients are discussed, which may include sex between professional caregivers and people with mental retardation. None the less, any direct account of the moral dimensions of sex with or between mentally retarded people is absent.

Therefore, we have lively ethical discussions on sex and people with mental retardation without much philosophical depth and rigour, on the one hand, and sophisticated philosophical discussions on human sexuality without any systematic attention to people with mental retardation on the other hand. This article's intention is to build a bridge between these worlds by trying to determine which moral principles should guide us in evaluating sexual behaviour of people with mental retardation. For practical reasons, however, the scope of our undertaking will be limited. Our ethical reflections will be confined to sexual interactions between adults with mental retardation, which means, roughly, that three important aspects of sexuality in connection with mental retardation are not taken into account.

First, nothing will be said about sex between people with mental retardation and those who are *not* mentally retarded. Elsewhere (Spiecker & Steutel, 2000) we have discussed sex between people with mental retardation and providers of sexual services, both professional and non-professional (which is, in our view, morally permissible under particular circumstances), as well as sex between individuals with mental retardation and care professionals (which is, we argued, under no condition morally acceptable); but here we shall focus only on sex between people with mental retardation. Secondly, no attention will be paid to sexual behaviour of *children* with mental retardation. Later on we shall argue that the child–adult distinction may be drawn in different ways, depending on the perspective taken. In this context we are referring to the biological perspective, according to which the end of puberty is the line of demarcation between childhood and adulthood. Our focus will be on adults only, in the biological sense of the term: that is, on mentally retarded people with fully developed primary and secondary sexual characteristics. Thirdly, in scientific publications often different levels of mental retardation are distinguished, in particular between mild, moderate, severe and profound mental retardation (e.g. Hickson *et al.*, 1995, pp. 46–51). Although this classification is far from unproblematic, it may be useful for demarcating the group of people we are discussing. Our ethical

evaluation is restricted roughly to sexual behaviour of people with *mild* or *moderate* mental retardation (IQs from 35/40 to 70). Individuals who have severe or profound mental retardation (IQs below 35/40) do show sexual behaviour, which is mainly self-directed but sometimes also directed at other human beings. However, contrary to people assigned to the "higher" levels of mental retardation, they seem to lack the mental equipment for the kind of reciprocity involved in sexual *interaction*, such as elementary role-taking abilities and a clear differentiation between the self and others.

Given this brief subject demarcation, the principal question of our article can be formulated as follows: is sex between adults with mild or moderate mental retardation morally permissible and, if at all, under what conditions? Before attempting to provide an answer to this question we shall, in the next section, analyse briefly its central concepts, in particular the concept of sex and the concept of mental retardation. The moral principles we are looking for apply to sexual behaviour, but what are the criteria on the basis of which sexual activities can be distinguished from non-sexual ones? Especially with regard to a life world in which physical contact and bodily communication are salient, it is important to obtain a reasonably clear idea of these criteria. Perhaps even more important is a preliminary analysis of the concept of mental retardation, not only because quite different definitions have been proposed and defended in scientific and specialist literature, but also because an adequate view of the distinguishing characteristics of being mentally retarded might force us to amend moral conceptions of human sexuality that are prevalent in philosophical circles. With reference to the results of these analyses we shall, in the subsequent section, attempt to provide an answer to the central question. We shall argue that the principle of mutual consent cannot do all the ethical work it is often supposed to do. Our claim will be that valid consent should not be taken as a moral requirement for sexual interaction between people with mental retardation. On the basis of our moral views we shall, in the final section, indicate briefly the kind of moral education that should be part of the curriculum for prospective care professionals.

### **Conceptual Conditions**

What is a sexual act? Any definition of sexual activities purely in terms of particular physical or bodily characteristics seems to be doomed from the start (cf. Wilson, 1995, pp. 126–128; Soble, 1996, pp. 117–119). Take, for example, the view that sexual acts by their nature involve physical contact with the sexual or reproductive organs. It will be clear that the conditions stated in this definition are far from sufficient. Not all activities which involve such physical contact are sexual—for instance, particular forms of medical examinations or surgical operations. Neither are the conditions indicated necessary. Forms of physical contact which do not involve the sexual or reproductive organs may surely be sexual. Indeed, many acts, such as flirting visually or whispering suggestively, can be sexual without involving any bodily contact at all.

These and similar flaws of other definitions of the same kind have stimulated

philosophers to define sexual acts in terms of specific psychic or mental characteristics, such as sexual desire, arousal, feeling and pleasure. Probably the best-known definition of this particular kind is the one framed by Alan H. Goldman (1977, p. 268): "(...) sexual desire is desire for contact with another person's body and for the pleasure which such contact produces; sexual activity is activity which tends to fulfill such desire of the agent". Whatever one may think of Goldman's definition and the additional explanation he offers, we believe that his attempt to give a neutral analysis of the concept of sexual activity should be applauded. Too often the concept of sex is confused with normative conceptions about sexuality, not only with particular views of morally good sex but also with ideas about good sex in a non-moral sense. In analysing the concept of sexual activity we should discriminate carefully between conceptual and normative conditions, that is, between the conditions that make an act a *sexual* act and the conditions which make a sexual act a *good* act. This is exactly what Goldman is trying to accomplish.

Yet his definition is not acceptable as it stands, partly because some background normative view of good sex still seems to distort his analysis. With reference to several critical accounts of Goldman's analysis (Soble, 1997, pp. 73–75, 1998, pp. 12–14; Primoratz, 1999, pp. 41–49), we shall raise four points of criticism. The first two points show that some of the conditions stated are not necessary (the definition is too narrow), while the last two points are meant to demonstrate that taken together the conditions are not sufficient (the definition is too broad).

First, some activities are clearly sexual but do not tend to fulfil a desire for contact with another person's body. For example, solitary masturbation may be the expression of a desire for contact with another person's body but obviously does not tend to fulfil such a desire. The same holds true of certain forms of fetishism (such as fondling shoes) and perversions (such as coprophagia). Goldman's linking of sexual acts with the indicated desire seems to express his preference for a particular type of sex and therefore affects the neutrality of his analysis. Secondly, even if we would replace Goldman's definition of sexual desire for a more appropriate one, his definition of sexual activity would still be untenable. He claims that sexual activity tends to fulfil a sexual desire of the agent, but many activities that we identify as sexual are neither the expression nor the fulfilment of the agent's sexual desires. Take, for example, a prostitute who is strongly disgusted by performing fellatio. Her performing fellatio on a man is clearly a sexual act, but it would be hard to demonstrate that the act tends to fulfil *her* sexual desires. The reason why we call the act sexual rather pertains to the fact that it tends to arouse or satisfy a sexual desire of another person. For the very same reason a care professional who masturbates a severely spastic person with mental retardation is performing a sexual act, even if the act does not at all tend to fulfil or arouse a sexual desire of the care professional. Thirdly, on Goldman's definition an act is sexual if it tends to fulfil a desire for pleasures produced by contact with another person's body. Some activities, however, do seem to fulfil such a desire without being sexual. Activities such as wrestling, romping, cuddling and hugging are often not sexual but none the less may be performed because they involve physical contact that is pleasurable in itself. Therefore, a weak point of Goldman's analysis is that it fails to discriminate between

sexual pleasures and other kinds of bodily pleasures. A desire for contact with another person's body will be sexual only if it is a desire for the *sexual* pleasures such physical contact brings. Fourthly, even if particular activities do fulfil a person's sexual desire by producing sexual pleasure, they still may not be sexual by nature. What also seems to be necessary is that such activities are performed with the *intention* of fulfilling sexual desire. Actions such as hugging, fondling and giving massage may fulfil sexual desire by generating sexual pleasure, but we feel reluctant to call them "sexual" if those pleasures are produced completely inadvertently. Washing a person with mental retardation may produce sexual pleasures, but if the professional caretaker does not have any intention to do so, it can hardly be regarded as a sexual act.

These counter-examples force us to frame another definition of sexual acts, at least if we want to hold on to Goldman's intention not to offer a stipulative but a descriptive definition of the term concerned. An alternative analysis, which is in our view more adequate, is that sexual desire is desire for sexual pleasure, and sexual activity is activity which tends to, and is intended to, arouse or fulfil such desire of the agent or of someone else. This definition is not susceptible to the points of criticism given above. According to our alternative definition of sexual desire, solitary masturbation and the indicated forms of fetishism and perversions should be identified as sexual activities. Although they do not tend to fulfil a desire for the pleasure of contact with another person's body, they do plainly tend to fulfil the agent's desire for sexual pleasure. Moreover, by also introducing sexual desires of other people than the agent, activities that do not give the agent any sexual pleasure but fulfil the sexual desire of someone else, such as the indicated activities of the prostitute, are rightly called sexual. Furthermore, activities such as wrestling and cuddling, even if accompanied by intense bodily pleasures, should not be identified as sexual so long as these pleasures are not of a sexual nature. Lastly, our analysis implies that activities which may tend to arouse or fulfil sexual desire but are not intended to do so, such as forms of touching, rubbing and caressing which inadvertently produce sexual pleasure, are not to be counted in the class of sexual activities.

Although our definition is not affected by the counter-examples we produced to tackle Goldman's analysis, we do not want to deny that it has its own difficulties. For example, our analysis of both "sexual activity" and "sexual desire" appeals to the concept of sexual pleasure, and the trouble with taking the latter concept as logically more basic is that rather complicated concepts are explained in terms of a concept that is perhaps even more elusive. For if "sexual pleasure" is not to be taken as a primitive concept, what exactly is the difference between contact that produces sexual pleasure and that which produces some other pleasure? Primoratz (1999, pp. 46–47), who also defines sexual desire as desire for sexual pleasure, tries to specify the latter notion by linking it with arousal experienced in the sexual parts of the body; but could we identify which parts of the body are sexual without appealing, not even implicitly, to mental dispositions and phenomena such as sexual desire and sexual pleasure?

This is not the place to go into such difficulties, however. Following on Goldman's intentions, we attempted to offer a definition of "sexual activity" that

is as neutral as possible. On ideological or religious grounds one could produce a definition that links sexuality with communication and love or, even more restrictively, with marriage and reproduction, as a consequence of which many people with mental retardation do not seem to be sexual beings at all. But if one tries to evade such ideological distortions by offering a neutral analysis, as we did, people with mental retardation appear as they are: individuals who may be involved in sexual activities because, just like other human beings, they have sexual desires and are able to enjoy sexual pleasures (cf. Bosch, 1995).

Also constitutive of our central question is the concept of mental retardation. Analysing this concept involves explicating the distinctive characteristics of being mentally retarded, particularly those that are fundamental in two different respects. First, they have to *explain* the various limitations in adaptive behaviour referred to in operational definitions of "mental retardation". For example, the definition framed by the American Association on Mental Retardation (1992, pp. 5–6, 38–41) refers to limitations in two or more adaptive skill areas such as communication, self-care, home living, health and safety. An analysis of the concept of mental retardation has to explain why people with mental retardation have the limitations indicated in coping with the ordinary challenges of everyday living in the community. Secondly, the characteristics to be revealed also have to *justify* various practices of special treatment of people with mental retardation. To challenge the so-called defect model, the Dutch Federation of Parents' Associations (1989) decided to refer to the mentally retarded as "people with possibilities", but how could such a definition offer any justification of the different forms of special treatment the Federation is advocating, such as forms of additional support and services beyond those provided to people who are not mentally retarded? Treating people with mental retardation differently from those who are not mentally retarded cannot be vindicated by indicating similarities, but needs to be justified by pointing out morally relevant distinctions (cf. Bayles, 1985). Precisely these distinctions are the focus of attention in analysing the concept of mental retardation.

In our view, the distinctive characteristics of being mentally retarded should be located in certain limitations or deficiencies in the sphere of *practical rationality*. Stated crudely, practical reason is the capacity of determining and weighing the pros and cons of different actions one might perform under the circumstances, with the intention of determining which alternative is the right, most desirable or virtuous one. Two basic types of practical rationality might be distinguished, namely prudential and moral thinking. Typical of the former type of deliberation is that the various options are assessed in terms of self-regarding considerations, that is, in terms of reasons which refer to the interests or long-term welfare of the agent herself. In the latter type of practical thinking the pros and cons are in the end other-regarding, that is, referring to the welfare or intrinsic dignity of other people than the agent. Our claim is that certain faults or limitations in both prudential and moral thinking are distinctive of people with mental retardation. These deficiencies in practical reasoning both explain their adaptive skill limitations and justify particular forms of special treatment.

However, nobody's practical thinking is perfect. We all make mistakes and

show deficiencies in thinking about matters of prudence and morality. So what exactly are the limitations in practical rationality that are typical of people with mental retardation? Perhaps the best way to approach this question is by introducing some criterion on the basis of which the deliberative capacities of people with mental retardation have to be judged as defective. The criterion we have in mind is obviously not some elevated, virtually unattainable ideal of practical rationality, such as Aristotle's conception of the fully virtuous person or Kant's ideal of moral autonomy. If we take such an ideal of practical wisdom as a starting-point, not only the reasoning powers of people with mental retardation but almost everyone's capacities of practical reasoning have to be regarded as in some way defective. Our criterion for determining whether or not someone's powers of practical deliberation are deficient is much more realistic, in such a manner that it can be attained by the major part of humankind. It is the criterion of *adulthood*. In other words, our claim is that the deliberative capacities of people with mental retardation are defective in relation to the powers of practical reasoning of the one who is rightly considered to be an adult.

A brief account of the distinction between childhood and adulthood may be helpful in explaining the implications of our criterion. In the opening section, when we demarcated the subject matter of our ethical evaluations, we drew the line between childhood and adulthood from a biological point of view. Here, however, we do not use the terms in a biological sense, but take them as denoting so-called *status* concepts (Schapiro, 1999, pp. 717–718). Calling an individual a child or an adult, in the status meaning of those terms, implies logically making claims, however implicitly, about which ways of treating the person are proper or improper, legitimate or illegitimate. For example, attributing to someone the status of a child normally implies that particular forms of paternalistic guidance and moral supervision are seen as desirable or even required. Because being a child is the opposite of being an adult, treating a person with the status of an adult in a similar way would be improper and could even be deeply insulting. The reason why the indicated forms of treating children are seen as appropriate or required is that the child's capacities of practical reasoning are deficient or underdeveloped, not, or at least not primarily, in relation to some ideal of human perfection, but compared with the rather mundane level of practical rationality associated with the status of adulthood. Because adults are supposed to be generally capable of determining for themselves which kind of conduct has to be regarded as prudent or moral under the circumstances, they do not need the paternalistic guidance and moral supervision that is generally seen as appropriate with regard to children (cf. Archard, 1993, pp. 51–53, 64–69; Steutel & Spiecker, 2000, pp. 330–331).

To prevent misunderstandings it is important to make a distinction between two different types of status concepts, which may be called conventional and fundamental, respectively (cf. Schapiro, 1999, p. 715). Mainly for practical reasons, the distinction between children and adults is drawn on the basis of conventional standards, especially quantitative criteria. For example, porn shows are legally open to adults only, and according to the law one counts as an adult if one has reached the age of 18 years. It will be clear that our analysis does not relate to such



quantitative criteria but focuses on the fundamental, qualitative distinction between childhood and adulthood. Conventional applications of “child” and “adult” may be fully in line with fundamental applications, but there may also be remarkable discrepancies between them. A person who has the status of a child according to conventional criteria may have the adult status according to fundamental criteria, and vice versa, depending on whether or not the person’s powers of practical reasoning are mature or fully developed. It is also important to notice that children may function as adult people within a particular domain, while still functioning as children in other spheres of life. For example, according to both conventional and fundamental criteria, a person may have the status of a child with regard to the political domain, and at the same time have the status of an adult with respect to the sexual sphere of life.

On the basis of this brief account of the child–adult distinction, people with mental retardation could be defined as human beings who are lacking to a certain extent the capacities of practical reasoning implied in having the status of an adult. Moreover, different from most children who are not mentally retarded, children with mental retardation will not fully grow into persons who have the deliberative powers typical of adulthood. Due to their significantly subaverage intellectual capabilities, their powers of practical reasoning will permanently show at least some of the limitations that are distinctive of the status of being a child. This is the reason why they are to a certain extent, and with regard to more or less domains of discretion, permanently dependent on the paternalistic guidance and moral supervision of adult caregivers. Nowadays it is almost common practice to stimulate people with mental retardation to determine for themselves how to lead their own lives wherever they can (cf. Dinerstein *et al.*, 1999). In our view, this policy should be supported forcefully, because mentally retarded people have been denied the opportunity of making their own choices all too often, and in respect of too many domains. But if no form of authoritative guidance in matters of prudence or morality is seen as proper or is no longer required, the people concerned are by definition not mentally retarded.

### **Moral Conditions: the principle of additional consent**

During the last four decades or so moral views on sexuality have changed drastically in the Netherlands. As late as the 1960s marriage and reproduction were generally taken as the principal criteria of permissible sexual behaviour. Nowadays the common practice is to appraise sexual activities on the basis of liberal principles, in particular the principle of *mutual consent*. The prevailing view is that any kind of sexual practice is morally permissible, including sex before marriage and sex without any possibility of procreation, as long as the people concerned have given their consent and no significant harm is caused to third parties.

Although the principle of mutual consent is widely endorsed nowadays, albeit often implicitly, its interpretation is far from unproblematic (cf. Soble, 1996; Archard, 1998). A first major problem is how exactly the notion of consent should be interpreted. It will be clear that not every instance of consent will be valid; that

means, a form of consent which makes a sexual practice morally permissible, at least *prima facie*. For example, the fact that someone has consented to having sex under serious threat or severe pressure can hardly be taken as a good reason for considering the sex morally legitimate; but what exactly are the conditions which validate the consent of a person? The standard view in liberal circles is that valid consent is freely given, on the basis of appropriate information, by someone with mature powers of judgement. Correspondingly, the conditions which are regarded as invalidating an act of consent are coercion, fraud, as well as underdeveloped capacities of deliberation (cf. Archard, 1998, pp. 44–53).

So far so good; but obviously the next question is how these validating and invalidating conditions should be interpreted. At this point opinions are beginning to diverge considerably, also in liberal circles. Take, for example, the notion of coercion and the corresponding notion of voluntariness. Some philosophers are inclined to define the notion of coercion rather restrictively, in such a manner that only serious threats, such as threats of killing or inflicting bodily injury or grave economic harm, are coercive to a degree which makes consent involuntary and therefore invalid. Others, in particular radical feminists, define the notion of coercion so broadly that whenever a woman has sex with a man for some extrinsic reason, and not out of her own genuine affection and desire, she is coerced and therefore also raped. However, going into these and related discussions would lead us too far afield. Here we simply want to point out that an interpretation of the (in)validating conditions should be capable of standing the responsibility test. If we accept the claim that particular circumstances should be taken as invalidating an act of consent, we also must be able to subscribe to the view that the person concerned cannot be held responsible, or at least not fully responsible, for what she did. If we hold someone fully accountable for her sexual behaviour, it would be inconsistent also to claim that the person's consent was somehow invalid. The invalidating conditions that have to do with coercion and fraud belong to the class of *excusing* conditions (which block responsibility for particular acts the agent has performed), whereas the absence of mature deliberative capacities can better be regarded as an *exempting* condition (which makes it inappropriate to hold the agent accountable more generally) (cf. Wallace, 1994, pp. 118, 154).

Another major problem is whether the principle of mutual consent provides sufficient conditions of moral permissibility. Is it enough for some sexual interaction to be morally legitimate that it is consensual? Or can we point out sexual practices that comply with the principle of mutual consent but nonetheless are morally unacceptable or at least morally dubious? Which answer will be given to these questions is obviously dependent on how the (in)validating conditions are interpreted. The broader the definition of terms such as "coercion" and "fraud", the greater the chance that the principle will be sufficient. We could even decide to *make* the principle sufficient by stretching these terms wherever necessary. However, if we take our common sense views on moral responsibility as a criterion for testing the validity of consent, we have to admit that valid consent is not enough for making every form of sexual activity morally permissible. The consent of the people involved may be valid because they are fully responsible for what they do, but none the less

the sexual interaction may be morally reprehensible because one person is *exploiting* the other person; for example, by taking undue advantage of the other person's vulnerabilities, dire needs, limited alternatives or meagre circumstances. To cover these cases we need a second moral principle, which may be called the principle of non-exploitation (Spiecker & Steutel, 1997, pp. 336–337).

A third major problem is whether compliance with the principle of mutual consent is necessary for making the sexual activity morally permissible. Is sexual interaction always morally wrong if no valid consent is given? Raymond Belliotti answers this question in the affirmative, as may be deduced from the moral test he proposes: "Have the parties, possessing the basic capacities necessary for autonomous choice, voluntarily agreed to a particular sexual interaction without force, fraud, and explicit duress? If the answer is negative then we need go no further: the sexual act is morally impermissible" (Belliotti, 1993, pp. 199–200). Although he grants that critics might conjure hypothetical counterexamples (e.g. saving 10 other people's lives or preventing 10 other rapes by raping one person), he sticks to the deontological view that non-consensual sex can never be morally justified, not even in the extreme situations referred to (pp. 196–199).

We believe, however, that circumstances can be pointed out under which non-consensual sex *is* morally permissible. The counter-examples Belliotti discusses are far-fetched and even bizarre. Although he suspects that with sufficient ingenuity and care more realistic examples could be given, none of these are actually offered. But what about sex between people with mental retardation? If valid consent is taken as a necessary condition of moral permissibility, many cases of sexual interaction between people with mental retardation should be deemed morally wrong, not because the people involved are somehow coerced or deceived, but because their capacities of judgement are deficient. Of course, which level of practical rationality is required by the principle of mutual consent is a matter in dispute. But if we take the status of adulthood as our criterion, as we should, we may assume that people with moderate mental retardation are generally lacking the powers of judgement required for valid consent, while the deliberative capacities of people who are mildly mentally retarded will not be sufficient for valid consent in relatively complex situations.

In other words, particular forms of sex between people who are mentally retarded could be presented as real-life counter-examples. According to our considered moral intuitions, these examples cannot be brushed off but really do refute the claim that the principle of mutual consent provides necessary conditions of morally permissible sexual conduct. It goes without saying that not all forms of non-consensual sex between people with mental retardation are morally permissible. This is only the case if certain conditions are fulfilled, and rather paradoxically these conditions are fully consistent with the *spirit* of the principle of mutual consent. What are these moral conditions?

A first, obvious but very important condition is that the people with mental retardation express in word or deed that they want to have some form of sexual interaction with each other. Although *ex hypothesi* their consent is not valid, and therefore not sufficient for making the sexual contact morally permissible, it is surely

required morally. One might argue that the mutual desire for sexual contact should be persistent, or at any rate be more than merely an incidental impulse; but if one of the people involved does not want to have sex with the other person, even only temporarily, the mutual consent that is necessary for making the sex morally legitimate is absent. A second condition is that the people concerned are somehow supervised (occasionally or on a daily basis) by adults who know them well. They have caretakers who are fully entitled to the status of adulthood and who are acquainted with their patterns of behaviour, their fears and longings, as well as the things they experience as pleasurable or worthwhile. Thirdly, these caregivers should imagine themselves in the position of the people with mental retardation, and consider carefully whether they, if they were those retarded people themselves, would have consented voluntarily to the sexual interaction. The care providers are compensating for the more or less limited deliberative capacities of those who are mentally retarded, by trying to evaluate the situation on their behalf, that is, in terms of the wishes, goals and values of the retarded people and not on the basis of their own conception of the good. In fact, such an evaluation will be tantamount to weighing the pros and cons of the sexual interaction for the parties involved, and will only result in substitutive consent if, in the end, the benefits for both parties are seen as outweighing the disadvantages. A fourth condition is that the caretakers should try to find out whether or not the sexual interaction between the people with mental retardation will show elements of exploitation. Even if the interaction will be in the interest of both parties, according to the principle of non-exploitation the benefits of the interaction for one party should not be disproportionately meagre in comparison with the profits for the other party.

The essence of our proposal is that sexual interaction between people who are moderately mentally retarded, and sexual interaction between individuals with mild mental retardation in relatively complex situations, is only morally permissible under adult supervision that is both moral and paternalistic. The supervision is paternalistic because it consists in exercising some form of control on the basis of prudential considerations, that is, on the basis of reasons which refer to the interests or the long-term welfare of the people with mental retardation. In a substitutive way caretakers have to examine whether the sexual interaction, all things considered, is advantageous to the parties concerned. The supervision is moral because it is based on considerations which relate to the possibility of mutual consent and the absence of exploitation. As substitutes caregivers have to find out whether the interests of the parties concerned do justify a hypothetical voluntary consent and, if so, whether the profits for the parties are fairly balanced. If the results of the substitutive deliberations are positive, if, in other words, there are good reasons for believing that the sexual interaction will be proportionally profitable to both parties, no justified moral objections to the interaction can be raised. On the contrary, prohibiting such sexual activities, for example on the basis of ideological or religious convictions, is inconsistent with the fundamental moral principle of beneficence and therefore should itself be regarded as morally condemnable. Because the substitutive judgement of a particular care provider is a necessary condition for making the sex morally legitimate, the moral principle we proposed

could be called the principle of substitutive consent. It should be emphasised, however, that also the mutual consent of the people with mental retardation is morally required. Therefore the caregiver functions as a kind of *additional* decision-maker and the moral principle could perhaps better be termed the principle of additional consent.

David Archard (1998, p. 80) also questions the claim that valid consent should be taken as a necessary condition of morally permissible sex. Just as we did, he argues that the principle of mutual consent is implausible if it should be read as implying that non-consensual sex is always morally wrong; but his argument is somewhat different from ours. According to Archard some relationships, particularly those that are characterised by a very high degree of mutual trust and understanding, are “beyond consent”. Within such a relationship, Archard maintains, sexual interaction is morally permissible without explicit or tacit consent of the parties involved. He even believes that it would be wrong to insist that a relationship which lies “beyond consent” should be or become consensual (1998, pp. 25–27).

We agree with Archard that the type of relationship indicated, just as sex between people with mental retardation, should be taken as a genuine counter example against the view that consensuality is a necessary condition of permissible sex. Moreover, both counter-examples are consistent with the spirit of the principle of mutual consent, as they can both be regarded as implying some kind of hypothetical consent. A relationship “beyond consent”, says Archard, “is one whose parties *would* consent to their sexual interaction even though they do not, in fact, do so” (p. 27; cf. p. 44); but besides these similarities also important differences can be pointed out. In a relationship “beyond consent” those who assume that the parties are hypothetically consenting are the parties *themselves*, whereas the assumption that people with mental retardation are hypothetically consenting is made by an *outsider*, namely the caretaker. This point of difference between the counter-examples is related to another dissimilarity, which can be revealed by spelling out the if-clause of the respective hypothetical judgements. In a relationship “beyond consent” the parties would have consented validly if asked to give their opinion, whereas in cases of sexual interaction between people with mental retardation the parties would have consented validly if their deliberative capacities had been mature. What these if-clauses show is that people involved in a relationship “beyond consent”, in contradistinction to people with mental retardation, are supposed to have the full status of an adult.

### **Some Final Notes on the Moral Education of Care Professionals**

As may be deduced from our conceptual analysis and ethical evaluation, professionals who serve those with mental retardation have the difficult task of compensating for their limited capacities of practical reasoning under certain circumstances. Because both prudential and moral thinking of people with mental retardation are more or less deficient, care professionals have to act as their substitutes by doing part of the thinking for them. This complicated task makes professional caregivers at least partly responsible for the activities of individuals with mental retardation. Limited

deliberative capacities do function as an exempting condition for holding someone fully responsible. Having the task of compensating for such limitations implies being responsible as a substitute to a certain extent.

Care professionals also have the task of watching closely the often subtle boundaries between legitimate and illegitimate supervision. Although the deliberative capacities of people with mental retardation are somehow limited by definition, they should have the opportunity to arrange their own lives as they see fit wherever they can. Supervision is required to prevent serious prudential and moral derailments but can also be debilitating and repressive. Indeed, the presumption that people with mental retardation need prudential and moral supervision can be self-confirming. Inappropriate supervision can make them dependent on their caretakers instead of stimulating them to express their competences or acquire more mature capabilities (cf. Archard, 1993, pp. 31, 49, 68). In other words, care professionals not only have the task of thinking and deciding on behalf of people with mental retardation, they also have the task of determining when such additional thinking and deciding is called for.

Obviously, everyone who wants to become a care professional needs to be prepared for these complex tasks. With regard to the sexual life of people with mental retardation, being able and disposed to perform these tasks properly will roughly be tantamount to having the mental qualities needed for applying and maintaining the principle of additional consent. Consequently, promoting these qualities should be considered part and parcel of the preparation of students for their future job as care professionals. Because the indicated qualities are needed for applying and upholding a *moral* principle, promoting them has to be regarded as a central aim of their moral education. It includes three important components.

First, prospective care professionals should acquire the capacity to determine whether or not the principle of additional consent is applicable. As we have indicated above, the principle applies only to people with mental retardation who do not have the adult reasoning powers required for valid consent, so professional caretakers should be able to determine whether or not the people concerned are capable of giving valid consent to the form of sex they desire. Our conjecture is that people with moderate mental retardation generally lack the deliberative capacities required for valid consent in matters of sexual interaction, while the powers of judgement of people who are mildly retarded will be insufficient only if rather complex considerations or decisions are called for. Where exactly to draw the line is a contentious issue.

Secondly, those trained to become care professionals should also acquire the capacity to test the desired form of sexual interaction against the principle of additional consent. If the principle is deemed to be applicable, professional caretakers have the responsibility of determining whether or not they can give their substitutive consent. In order to acquire the capacity to perform this task properly, students need to be trained to do a lot of different things, such as determining what kind of sex is actually wanted, revealing possible forms of coercion, deception or exploitation, as well as weighing the effects of the sexual interaction in terms of the interests of the people concerned.

Thirdly, future care professionals should acquire the capacity to take appropriate measures if the desired form of sexuality is contrary to the principle of additional consent. If the principle is applicable and substitutive consent can be given no intervention of care professionals is needed, except for giving the proper support to the people concerned; but if the desired form of sexual interaction contravenes the principle of additional consent, professional caretakers should try to prevent the people from having that kind of sex. It is important that future care professionals are trained to influence the people in the most humane and respectful way under such circumstances. In particular, they should try to persuade the people to refrain from the sex they want by explaining them as clearly as possible what is wrong with it. Using coercive power should be seen as a last resort, to be considered only if persuasion backed up with trust and authority turns out to be ineffective. Because using force is a highly intrusive action, allowing the people to have the sex, even though it is contrary to the principle of additional consent, may be the morally best thing to do; particularly if the harmful consequences of the sexual interaction are moderate, coercive power may be a remedy that is worse than the disease.

*Correspondence:* Dr Ben Spiecker and Dr Jan Steutel, Department of Philosophy and History of Education, Vrije Universiteit, Van der Boechorststraat 1, 1081 BT Amsterdam, the Netherlands; E-mail: B.Spiecker@psy.vu.nl or JW.Steutel@psy.vu.nl

## NOTES

- [1] We know that many people, especially in the United Kingdom, consider the term "people with mental retardation" to be stigmatising and offensive. For that reason they prefer other expressions, in particular the term "people with learning disabilities" (or "learning difficulties"). None the less we opt for the former term, partly because it is widely regarded as the proper one in the United States, and partly because the latter term is much too broad and therefore may give rise to misunderstanding. Obviously the term "people with mental retardation" is used in this article in a non-pejorative sense.

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